

1 Scott H. Jacobs (SBN 81980)
2 Christopher O. Rivas (SBN 238765)
3 REED SMITH LLP
4 355 S. Grand Avenue, Suite 2900
5 Los Angeles, CA 90071
6 Telephone: 213.457.8000
7 Facsimile: 213.457.8080

8 Attorneys for Defendants
9 WMC Mortgage, LLC and
10 GE Consumer Finance, Inc.

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 OAKLAND DIVISION

14 PATRICIA C. BARBERA,

15 Plaintiff

16 vs.

17 WMC MORTGAGE CORPORATION, a
18 California corporation; aka WMC Direct, a
19 California Business Entity; GE Consumer
20 Finance, a unit of General Electric Company;
21 Select Portfolio Servicing Corp, a Utah
22 Corporation; Fairbanks Holding Corporation, a
23 Delaware Corporation; and Land Title Company
24 of Marin, a California Business Entity;
25 Does 1 thru 100, inclusive.

26 Defendants.

Case No.: 4:08-cv-02677-SBA

Earlier Related Case: 4:04-cv-03738-SBA

**DECLARATION OF CHRISTOPHER O.
RIVAS IN SUPPORT OF MOTION TO
DISMISS COMPLAINT**

Date: July 29, 2008
Time: 1:00 p.m.
Courtroom: 3, Third Floor

Honorable Sandra Brown Armstrong

REED SMITH LLP
A limited liability partnership formed in the State of Delaware

DECLARATION OF CHRISTOPHER O. RIVAS

I, CHRISTOPHER O. RIVAS, declare as follows:

1. I am an attorney dully licensed by the State of California to practice before all the courts of the State. I am over the age of eighteen years and have personal knowledge of the facts set forth herein and, if called upon as a witness, I could and would competently testify on personal knowledge, and on information and belief where indicated, as to all of the matters stated herein.

2. I am an associate with the law firm of Reed Smith LLP, which represents defendants WMC Mortgage, LLC ("WMC Mortgage") (successor in interest to "WMC Mortgage Corporation"), GE Consumer Finance ("GECF", and collectively with WMC Mortgage Corporation, "Defendants")

3. Pursuant to the Honorable Judge Armstrong's standing orders and the Local Rules of this Court, I make this declaration in support of Defendant's Motion to Dismiss Complaint ("Motion"), filed concurrently herewith.

4. I met and conferred with Plaintiff twice before filing this Motion. First, on May 30, 2008, I called Plaintiff shortly after receiving a faxed letter from her regarding her concerns about the removal of this action to federal court. Attached hereto as **Exhibit A** is a true and correct copy of Plaintiff's May 30, 2008 letter. During that telephone conference, I reminded Plaintiff that her prior action with Defendants was already litigated and dismissed. Plaintiff argued that her action against Defendants was dismissed without prejudice. I gave Plaintiff the dates of the federal and state orders dismissing her prior action with prejudice, and instructed her how to retrieve those orders from Pacer and from the San Francisco Superior Court's online docketing system. During that call, I asked Plaintiff to dismiss her complaint, and Plaintiff told me that she would look at the federal and state orders dismissing her prior action.

5. Second, on June 17, 2008, I sent Plaintiff a letter via e-mail and overnight mail (UPS) once again asking her to dismiss this action. In that letter, I enclosed the federal and state court orders dismissing Plaintiff's prior action with prejudice. I told Plaintiff that I intended to file a motion to dismiss her complaint on behalf Defendants, and once again asked her to dismiss her

1 action against Defendants. Attached hereto as **Exhibit B** is a true and correct copy of my June 17,
2 2008 letter.

3 6. At the time of filing this declaration, I have not heard back from Plaintiff in response
4 to my June 17, 2008 letter, although Plaintiff faxed me a letter on June 19, 2008, that was unclear,
5 but appeared to be about Plaintiff's recently filed motion to remand. Attached hereto as **Exhibit C** is
6 a true and correct copy of Plaintiff's June 19, 2008 letter.

7
8
9 DATED: June 19, 2008

REED SMITH LLP

10
11 By /s/ Christopher O. Rivas

12 Scott H. Jacobs
13 Christopher O. Rivas
14 Attorneys for Defendants
15 WMC Mortgage, LLC and
16 GE Consumer Finance, Inc.

17 DOCSLA-15644614.1
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REED SMITH LLP
A limited liability partnership formed in the State of Delaware

EXHIBIT A

May 30 08 03:08p

p. 1

Patricia C. Barbera
24 Caribe Isle
Novato, Ca 94949
Phone: (415) 382-9617
Fax(415) 382-0756
E-mail: wobirds@comcast.net

May 30, 2008

Christopher O. Rivas
ReedSmith
355 South Grand Avenue, Suite 2900
Los Angeles, CA 90071-1611
Phone: (213) 457-8019
Fax: (213) 457-0080

RE: BARBERA vs. WMC MORTGAGE CORP. CV 081763.

Dear Mr. Rivas:

First allow me to commend WMC for their choice of representation.

Next, How do you figure that the response date is June 4, 2008. WMC was served on April 28, 2008. Exhibit included. It is untimely.

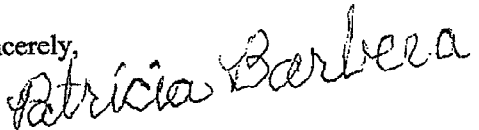
Your efforts to remove the case to the federal court is flawed as :

- 1.) The Quiet Title is an Absolute Jurisdiction case and cannot be removed.
- 2.) A corporation is a "citizen" both of the state in which it was incorporated and of the state where it has its principle place of business. 28 U.S.C. § 1332(C)(1). Therefore, actions brought in the courts of either state cannot be removed to a federal court.

Kindly advise.

Please feel free to call me at :(415) 382-9617.

Sincerely,



Patricia C. Barbera

May 30 08 03:08p

p. 2



Home | Help | Sign In

Track & Confirm

FAQs

Track & Confirm

Search Results

Label/Receipt Number: EH23 5581 978U S
Status: Delivered

Your item was delivered at 2:39 PM on April 28, 2008 in BURBANK, CA 91504 to WMC MORTGAGE. The item was signed for by C TORRES.

[Additional Details >](#) [Return to USPS.com Home >](#)

Track & Confirm

Enter Label/Receipt Number.

[Go >](#)

Notification Options

Track & Confirm by email

Get current event information or updates for your item sent to you or others by email. [Go >](#)

Proof of Delivery

Verify who signed for your item by email, fax, or mail. [Go >](#)

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| TO: (PLEASE PRINT) PHONE () | | |
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<http://trkcnfrm1.smi.usps.com/PTInternetWeb/InterLabelInquiry.do>

5/6/2008

EXHIBIT B

ReedSmith

Christopher O. Rivas
Direct Phone: 213.457.8019
Email: crivas@reedsmith.com

Reed Smith LLP
355 South Grand Avenue
Suite 2900
Los Angeles, CA 90071-1514
+1 213 457 8000
Fax +1 213 457 8080
reedsmith.com

June 17, 2008

Via UPS and E-Mail

Patricia C. Barbera
24 Caribe Isle
Novato, CA 94949

Re: Patricia Barbera v. WMC Mortgage Corporation, et al.;
United States District Court, Northern District of California; Case No. 4:08-cv-2677

Dear Ms. Barbera:

Reed Smith represents WMC Mortgage, LLC ("WMC Mortgage") (successor in interest to "WMC Mortgage Corporation") and GE Consumer Finance, Inc. ("GECF") in the above-referenced matter.

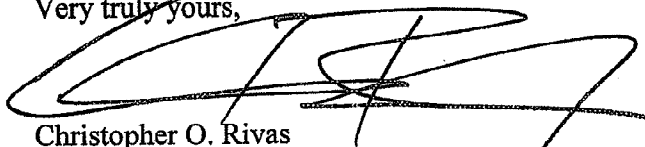
This letter follows my May 30, 2008 telephone conversation with you, during which I informed you that your lawsuit against my clients is frivolous because it was already litigated and your claims were dismissed with prejudice by both the state and federal courts. In that conversation, I also pointed you to the specific orders dismissing your prior action. (See January 19, 2006 federal court order and April 3, 2006 state court order, enclosed herewith). It is inappropriate for you to bring the same action against my clients after the Court has already ruled against you -- your complaint is barred under the doctrine of *res judicata*.

Your complaint suffers from additional substantive defects and many of your causes of action have already been determined to be barred by various statutes of limitation. These deficiencies will be the subject of our motion to dismiss, which we intend to file this Thursday, June 19, 2008 unless you agree to dismiss this action in its entirety.

I also encourage you to read Federal Rule of Civil Procedure 11 ("Rule 11"), which provides that the Court may impose monetary sanctions against an unrepresented party for filing a frivolous lawsuit. A complaint must allege "claims, defenses, and other legal contentions [that] are warranted by existing law . . ." Your complaint does not measure up to the standards require by Rule 11, and your continued prosecution of this action in the face of prior court orders against you may subject you to sanctions under that rule.

We request that you notify us by Wednesday, June 18, 2008 if you agree to dismiss your action.

Very truly yours,



Christopher O. Rivas

NEW YORK ♦ LONDON ♦ HONG KONG ♦ CHICAGO ♦ WASHINGTON, D.C. ♦ BEIJING ♦ PARIS ♦ LOS ANGELES ♦ SAN FRANCISCO ♦ PHILADELPHIA ♦ PITTSBURGH
OAKLAND ♦ MUNICH ♦ ABU DHABI ♦ PRINCETON ♦ NORTHERN VIRGINIA ♦ WILMINGTON ♦ BIRMINGHAM ♦ DUBAI ♦ CENTURY CITY ♦ RICHMOND ♦ GREECE

DOCSLA-15644381.1-CORIVAS

1 MICHAEL J. AGOGLIA (BAR NO. 154810)
2 HEATHER A. MOSER (BAR NO. 212686)
3 SETA ARABIAN (BAR NO. 223178)
4 MORRISON & FOERSTER LLP
5 425 Market Street
San Francisco, California 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522
sarabian@mofo.com

6 Attorneys for Defendants
7 WMC MORTGAGE CORP., WMC FINANCE CO., and
WMCDIRECT

FILED
SUPERIOR COURT
COUNTY OF SAN FRANCISCO

APR 8 - 2008

GORDON PARK-LI, Clerk

BY: Anne Rodriguez
Deputy Clerk

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO
10 UNLIMITED CIVIL JURISDICTION

11
12 Patricia C. Barbera,

13 Plaintiff,

14 v.

15 WMC Mortgage Corp., a California Corporation;
16 WMC Finance Co.; Apollo Management L.P.;
17 WMCDirect; GE Consumer Finance, a unit of
General Electric Company; Fairbanks Capital
18 Corp., a Utah Corporation; Fairbanks Capital
Holding Corp., a Delaware Corporation;
19 California Land Title Company of Marin, a
California business entity; Does 1 through 100,
inclusive,

20 Defendants.

Case No. CGC-04-433269

CLASS ACTION

~~Plaintiff's~~ JUDGMENT IN
FAVOR OF DEFENDANTS WMC
MORTGAGE CORP., WMC
FINANCE CO., AND
WMCDIRECT

Judge: The Honorable Peter J.
Busch
Dept.: 2 Annex
Action Filed: July 23, 2004
Trial Date: None Set

~~Plaintiff's~~ JUDGMENT IN FAVOR OF WMC

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sf-2092749

1 This matter having come on for hearing before the Court, the Honorable Peter J. Busch
 2 presiding, on March 8, 2006, on defendants WMC Mortgage Corp., WMC Finance Co., and
 3 WMCDirect's motion for judgment on the pleading as to plaintiff's Second Amended Complaint;
 4 in light of the Honorable Sandra B. Armstrong's January 19, 2006 Order dismissing plaintiff's
 5 federal causes of action with prejudice and this Court's March 8, 2006 Order dismissing
 6 plaintiff's remanded state-law causes of action with prejudice (a true and correct copy of which is
 7 attached hereto as Exhibit 1); and for good cause shown;

8 IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

9 That Judgment be entered in favor of defendants WMC Mortgage Corp., WMC Finance
 10 Co., and WMCDirect and against plaintiff Patricia Barbera for defendants' costs and
 11 disbursements incurred in this action amounting to the sum of \$ _____, pursuant to the Order
 12 granting defendants' motion for judgment on the pleadings without leave to amend.

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 15 Dated: 4/3/06

Peter J. Busch
 The Honorable Peter J. Busch

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~~Placed~~ JUDGMENT IN FAVOR OF WMC

sf-2092749

EXHIBIT 1

COPY

1 MICHAEL J. AGOGLIA (BAR NO. 154810)
2 HEATHER A. MOSER (BAR NO. 212686)
3 SETA ARABIAN (BAR NO. 223178)
4 MORRISON & FOERSTER LLP
5 425 Market Street
6 San Francisco, California 94105-2482
7 Telephone: (415) 268-7000
8 Facsimile: (415) 268-7522
9 sarabian@mofo.com

10 Attorneys for Defendants
11 WMC MORTGAGE CORP., WMC FINANCE CO., and
12 WMCDIRECT

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SAN FRANCISCO
15 UNLIMITED CIVIL JURISDICTION

16 Patricia C. Barbera,

17 Plaintiff,

18 v.

19 WMC Mortgage Corp., a California Corporation;
20 WMC Finance Co.; Apollo Management L.P.;
21 WMCDirect; GE Consumer Finance, a unit of
22 General Electric Company; Fairbanks Capital
23 Corp., a Utah Corporation; Fairbanks Capital
24 Holding Corp., a Delaware Corporation;
25 California Land Title Company of Marin, a
26 California business entity; Does 1 through 100,
27 inclusive,

28 Defendants.

Case No. CGC-04-433269

CLASS ACTION

NOTICE OF ENTRY OF ORDER

Judge: The Honorable Peter J. Busch
Dept.: 2 Annex
Action Filed: July 23, 2004
Trial Date: None Set

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MAR 8 2006

BY: [Signature]

NOTICE OF ENTRY OF ORDER

sf-2092727

1 PLEASE TAKE NOTICE that on March 8, 2006, the Court entered an Order granting
2 without leave to amend the motion for judgment on the pleadings of defendants WMC Mortgage
3 Corp., WMC Finance Co., and WMCDirect. A true and correct copy of the Order is attached
4 hereto as Exhibit A.

5 Dated: March 8, 2006

MICHAEL J. AGOGLIA
HEATHER A. MOSER
SETA ARABIAN
MORRISON & FOERSTER LLP

8
9 By: 
Seta Arabian

10 Attorneys for Defendants
11 WMC MORTGAGE CORP., WMC
12 FINANCE CO., and WMCDIRECT
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1
NOTICE OF ENTRY OF ORDER

sf-2092727

PROOF OF SERVICE BY MAIL

(CCP 1013a, 2015.5)

I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California, 94105; I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with Morrison & Foerster's practice for collection and processing of correspondence for mailing with the United States Postal Service and know that in the ordinary course of Morrison & Foerster's business practice the document described below will be deposited with the United States Postal Service on the same date that it is placed at Morrison & Foerster with postage thereon fully prepaid for collection and mailing.

I further declare that on the date hereof I served a copy of:

NOTICE OF ENTRY OF ORDER

on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and mailing at Morrison & Foerster LLP, 425 Market Street, San Francisco, California, 94105, in accordance with Morrison & Foerster's ordinary business practices:

Maximilian J.B. Hopkins
7665 Redwood Blvd., Suite 200
Novato, CA 94945

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at San Francisco, California, this 8th day of March, 2006.

Regina C. Archuleta-Rodriguez
(typed)

(signature)

PROOF OF SERVICE

sf-2083844

EXHIBIT A

Exhibit B
Page 8 of 26

1 MICHAEL J. AGOGLIA (BAR NO. 154810)
2 HEATHER A. MOSER (BAR NO. 212686)
3 SETA ARABIAN (BAR NO. 223178)
4 MORRISON & FOERSTER LLP
5 425 Market Street
6 San Francisco, California 94105-2482
7 Telephone: (415) 268-7000
8 Facsimile: (415) 268-7522
9 sarabian@mofo.com

10 Attorneys for Defendants
11 WMC MORTGAGE CORP., WMC FINANCE CO., and
12 WMCDIRECT

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SAN FRANCISCO
15 UNLIMITED CIVIL JURISDICTION

16 Patricia C. Barbera,

17 Plaintiff,

18 v.

19 WMC Mortgage Corp., a California Corporation;
20 WMC Finance Co.; Apollo Management L.P.;
21 WMCDirect; GE Consumer Finance, a unit of
22 General Electric Company; Fairbanks Capital
23 Corp., a Utah Corporation; Fairbanks Capital
24 Holding Corp., a Delaware Corporation;
25 California Land Title Company of Marin, a
26 California business entity; Does 1 through 100,
27 inclusive,

28 Defendants.

ENDORSED FILED
SUPERIOR COURT
COUNTY OF SAN FRANCISCO

MAR 8 - 2006

GORDON PARK-LI, Clerk
BY: ANNA REDIGONDA
Deputy Clerk

Case No. CGC-04-433269

CLASS ACTION

~~PROPOSED~~ ORDER
GRANTING DEFENDANTS WMC
MORTGAGE CORP., WMC
FINANCE CO., AND
WMCDIRECT'S MOTION FOR
JUDGMENT ON THE
PLEADINGS

Date: March 8, 2006
Time: 8:30 a.m.
Judge: The Honorable Peter J.
Busch
Dept.: 2 Annex
Action Filed: July 23, 2004
Trial Date: None Set

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MAR 8 2006

[Signature]

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS
sf-2078169

1. Defendants WMC Mortgage Corp., WMC Finance Co., and WMCDirect's (collectively,
 2. "WMC") Motion for Judgment on the Pleadings as plaintiff Patricia Barbera's Second Amended
 3. Complaint came on for hearing before this Court. After careful consideration of the briefs and
 4. arguments of counsel, and all other matters presented to the Court, WMC's Motion for Judgment
 5. on the Pleadings is hereby GRANTED without leave to amend, and all claims in the Second
 6. Amended Complaint are dismissed with prejudice, on the following grounds.

7. 1. Plaintiff's claim under California Business & Professions Code section 17200
 8. ("UCL") fails under the four-year statute of limitations set forth at California Business &
 9. Professions Code section 17208. Plaintiff does not allege any conduct within four years before
 10. the filing of her action. Moreover, plaintiff could not allege any facts that WMC engaged in
 11. "predatory lending practices" at any time after July 2000, when Fairbanks took over servicing of
 12. plaintiff's loan.

13. 2. Plaintiff's claim under the Consumer Legal Remedies Act ("CLRA") is barred by
 14. the three-year statute of limitations set forth at California Civil Code section 1783. The latest
 15. conduct plaintiff refers to in her CLRA claim are incidents that took place in April 2000, over
 16. three years before plaintiff filed her complaint. Plaintiff's conclusory assertion that the CLRA
 17. "violations began when the loan was placed in June 1997 [sic] and they continue through the
 18. present time" does not save her claim from being time-barred. Plaintiff's CLRA claim also fails
 19. because the conduct alleged to violate the CLRA does not fall within the CLRA's scope. The
 20. Legislature chose to delete "credit" from the purview of the CLRA. *See* Assembly Bill No. 292
 21. (1970 Reg. Sess. (Jan. 21, 1970)), Assembly Bill No. 292 (1970 Reg. Sess. (Jan. 21, 1970) (as
 22. amended Aug. 7, 1970)); *see also* William L. Stern, *Bus. & Prof. C. § 17200 Practice* § 10:23
 23. (The Rutter Guide 2004) (noting legislative history of CLRA supports argument that "extensions
 24. of credit" not covered by the CLRA). Accordingly, the CLRA is inapplicable here because
 25. WMC's residential mortgage loan at issue was admittedly an extension of credit.

26. 3. Plaintiff's wrongful concealment claim is subject to a three-year statute of
 27. limitations under California Civil Procedure Code section 338(d). This claim is time-barred
 28. because it is based on an alleged misrepresentation at the time the loan was made in June 1997,

1 more than seven years before plaintiff filed her complaint. Her allegation that the doctrine of
 2 delayed discovery applies to her wrongful concealment claim fails because she does not plead any
 3 supporting facts and because her conclusory allegation is inconsistent with the allegations on
 4 which her wrongful concealment claim is based. Plaintiff's wrongful concealment claim also
 5 fails because it does not meet the particularity pleading requirements for fraud. *Lazar v. Super.*
 6 *Ct.*, 12 Cal. 4th 631, 645 (1996); *Stansfield v. Starkey*, 220 Cal. App. 3d 59, 73 (1990). Plaintiff
 7 fails to identify the content of the alleged "implied" misrepresentations, who made them, where
 8 or when they were made, or facts indicating why they were false when made.

9 4. Plaintiff's breach of contract claim is barred by the four-year statute of limitations
 10 period set forth at California Code of Civil Procedure section 337. The alleged conduct relating
 11 to her breach of contract claim occurred on or before April 11, 2000, more than four years before
 12 she filed her complaint. Her conclusory allegation that WMC breached the home loan agreement
 13 "[w]ithin four years of the filing of this complaint" does not save her claim from dismissal under
 14 the statute of limitations.

15 5. Plaintiff's usury claim is barred by the four-year statute of limitations found in the
 16 catch-all provision in California Code of Civil Procedure section 343. Because plaintiff's usury
 17 claim is based on the interest rate on the WMC loan she obtained in June 1997 — a rate
 18 undoubtedly known to her over seven years before she filed the complaint on July 23, 2004 — the
 19 four-year statute of limitations expired at the time the loan was made. Plaintiff's usury claim also
 20 fails because WMC is exempt from California usury provisions. The California Constitution
 21 permits an exemption from usury restrictions for "any loans made or arranged by any person
 22 licensed as a real estate broker by the State of California and secured in whole or in part by liens
 23 on real property." Cal. Const. art. XV, § 1. The exemption applies to WMC because at the time
 24 of plaintiff's loan, WMC was licensed as a real estate broker by the State of California and the
 25 loan was secured by a lien on plaintiff's home.

26 6. Plaintiff's claim for rescission fails because plaintiff has not stated a valid cause of
 27 action underlying the remedy. Rescission is a remedy, not an independent cause of action.
 28 *People ex rel. Kennedy v. Beaumont Inv., Ltd.*, 111 Cal. App. 4th 102, 133 (2003).

[Proposed] ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS
 sf-2078169

1 7. Plaintiff's claim for accounting fails because plaintiff has not stated a valid cause
 2 of action underlying the remedy. *Duggal v. G.E. Capital Commc'ns Servs., Inc.*, 81 Cal. App. 4th
 3 81, 95 (2000) ("right to an accounting is derivative and depends on the validity of a plaintiff's
 4 underlying claims").

5
 6 Dated: MAR 8 2006 2006

PETER J. BUSCH

The Honorable Peter J. Busch
 Judge of the Superior Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PATRICIA BARBERA,

No. C 04-3738 SBA

Plaintiff,

ORDER

v.

[Docket No. 111]

WMC MORTGAGE CORP., et al.,

Defendants.

This matter is before the Court on Defendants' WMC Mortgage Corp., WMC Finance Co., and WMC Direct (collectively "Defendants") motion to dismiss Plaintiff Patricia Barbera's ("Plaintiff") Second Amended Complaint ("SAC") for failure to state a claim upon which relief can be granted. Having read and considered the arguments presented by the parties in the papers submitted to the Court, the Court finds this matter appropriate for resolution without a hearing. The Court hereby GRANTS Defendants' motion to dismiss. Plaintiff's third, fourth and fifth claims are DISMISSED WITH PREJUDICE. The case is REMANDED to the Superior Court of the State of California in and for the County of San Francisco.

BACKGROUND

A. Factual Background¹

1. The Parties

Plaintiff is a 73-year old woman residing at all material times in the County of Marin, California.

¹ The following facts are taken from Plaintiff's SAC.

1 Defendant WMC Mortgage Corp. ("WMC") is an entity formed in part by Defendant Apollo
2 Management L.P. WMC is in the business of making subprime loans on residential property and
3 also acts as the administrator for those loans. Defendant WMCDirect, owned and operated by
4 WMC, is an online nationwide business services website for mortgage brokers. SAC ¶ 3. On June
5 14, 2004, Defendant GE Consumer Finance Co., the consumer lending unit of the General Electric
6 Company, purchased Defendant WMC Finance Co., including Defendants WMC and WMCDirect,
7 from affiliates of Apollo Management L.P. SAC ¶ 4.

8 2. Allegations

9 In June of 1997, Plaintiff was in a "desperate financial situation" and obtained a loan from
10 WMC for \$322,500. SAC ¶ 13. On June 12, 1997, Plaintiff executed the loan documents, at which
11 time "defendants failed to provide to Plaintiff two written notices of Plaintiff's right to rescind within
12 three days of closing, and defendants failed to prepare and deliver accurate disclosures that were
13 mandated" under the Truth in Lending Act, 15 U.S.C. section 1601 *et seq.* SAC ¶ 14.

14 On May 19, 1998, WMC notified Plaintiff that it had not received proof of her renewal of the
15 hazard insurance policy on Plaintiff's home. SAC ¶ 15. Despite numerous telephone calls from
16 Plaintiff to WMC, and verification provided to WMC by Plaintiff's insurance company that a copy
17 of Plaintiff's insurance policy had been mailed to WMC, WMC "force-place[d] a substitute policy
18 from another hazard insurance company at Plaintiff's expense." *Id.* This new policy had a premium
19 of \$2,242, nearly three times the annual premium of Plaintiff's policy. *Id.*

20 In January of 1999, Plaintiff received a letter from WMC stating that WMC had received
21 confirmation of Plaintiff's hazard insurance coverage and that WMC had cancelled both the force-
22 placed insurance and its charge to Plaintiff for that policy. *Id.* ¶ 16. However, WMC in fact did not
23 cancel the \$2,242 charge to Plaintiff's account and continued to impose an annual charge on
24 Plaintiff's account for this hazard insurance. *Id.* ¶ 17.

25 On August 19, 1999, WMC served on Plaintiff a ten-day default notice, listing the amount
26 alleged due on Plaintiff's mortgage, but, according to Plaintiff, the listed amounts due were false. *Id.*
27 ¶ 18. On November 5, 1999, using these excessive amounts as a pretext, WMC and its foreclosure
28

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28

1 agent, Millennium Foreclosure Services, LLC ("Millennium")², served Plaintiff with a notice of
 2 default in the amount of \$42,114.79. *Id.* On December 4, 1999, Plaintiff sent a detailed letter to
 3 WMC and Millennium, which constituted a "qualified written request" within the meaning of Real
 4 Estate Settlement Procedures Act ("RESPA") 12 U.S.C. section 2605(e), whereby she denied owing
 5 the amount shown in the default notice and renewed her previous oral requests to WMC for an
 6 accurate accounting. *Id.* ¶ 19. Plaintiff alleges WMC violated RESPA beginning in June of 1999
 7 through March 1, 2002 by failing to respond to Plaintiff's oral requests for an accounting, and failing
 8 to acknowledge or to respond within the statutory time limits to Plaintiff's "qualified written
 9 request."³ *Id.* ¶ 21. Furthermore, WMC continued to bill Plaintiff for improper charges and began to
 10 carry out a foreclosure sale of Plaintiff's home based upon these improper charges. *Id.*

11 On February 11, 2000, Plaintiff received from Millennium a Notice of Trustee's sale,
 12 recorded on February 7, 2000 citing a sale date of March 2, 2000 in the amount of \$372,316.39. *Id.*
 13 ¶ 23.

14 On February 27, 2000, Plaintiff sent via facsimile to WMC a copy of a telegram informing
 15 WMC that it had failed to respond to Plaintiff's previous letters, had failed to provide an accurate
 16 accounting, and had violated various laws and regulations. *Id.* ¶ 24. On March 1, 2000, WMC
 17 supplied Plaintiff with a statement of history of payments on the loan, but Plaintiff contends the
 18 statement was incomprehensible. *Id.* ¶ 25.

19 On March 2, 2000, Plaintiff notified WMC that she had filed a Chapter 13 bankruptcy
 20 petition and verified that the foreclosure had been cancelled. *Id.* ¶ 26. On April 11, 2000, Plaintiff
 21 asserts that, in violation of the automatic bankruptcy stay, WMC filed a Notice of Trustee's Sale
 22
 23
 24

25 ² Millennium is not a party in this action.

26 ³ 12 U.S.C. section 2605(e) of RESPA states a loan servicer shall provide a written response
 27 acknowledging receipt of the "qualified written request" within 20 days, and shall respond to such a
 28 request within 60 days, excluding legal public holidays, Saturdays, and Sundays. *See* 12 U.S.C. §
 2605(e); SAC ¶ 20.

1 scheduled for May 10, 2000. *Id.*⁴

2 **B. Procedural History**

3 Plaintiff filed the initial complaint in this case on July 23, 2004 in San Francisco Superior
4 Court against WMC, WMC Finance Co., Apollo Management L.P., WMC Direct, GE Consumer
5 Finance, Fairbanks Capital Corp., Fairbanks Capital Holding Corp., and California Land Title
6 Company of Marin ("Cal Land"). On September 3, 2004, the action was removed to this Court. On
7 January 7, 2005, after several stipulated extensions of time to respond to the complaint, Cal Land
8 filed an Answer to the Complaint.

9 On January 10, 2005, then defendants Fairbanks Capital Corporation and Fairbanks Capital
10 Holding Corporation (collectively "Fairbanks") filed a motion for summary judgment, in which they
11 claimed Plaintiff's suit was barred under the principles of res judicata and release because Plaintiff
12 was a member of a nationwide class action, which challenged the same conduct, and which was
13 subsequently settled. Because Plaintiff did not dispute that she was a member of the prior class
14

15 ⁴ Plaintiff alleges additional facts raised for the first time in her opposition to Defendants'
16 motion. Specifically, Plaintiff alleges: (1) Defendants "postdated receipt of payments, to make it appear
17 that they were delinquent and late charges are applied in addition to other obtuse designations" (Pl. Opp.
18 filed Oct. 11, 2005, ¶ 5); (2) Defendants "misapplied the extra which I included with my payments" (*Id.*
19 ¶ 7); (3) Defendants "had [Plaintiff's] bankruptcy stay lifted by use of false figures" (*Id.* ¶ 8); (4) "on
20 adjustable interest rate notices, [Defendants] failed to include: index used, index rate, interest rate,
21 (current and projected), and margin applied" (*Id.* ¶ 10); (5) Defendants harassed Plaintiff with automatic
22 message telephone calls (*Id.* ¶ 11); (6) Defendants refused to provide Plaintiff with information
23 concerning the amount due under her loan (*Id.* ¶ 12); (7) on February 24, 2000, Plaintiff's attorney
24 "faxed a factual protest and 'let's talk' letter" to Defendants regarding the February 11, 2000 Notice of
25 Trustee's Sale, to which there was no response (*Id.* ¶ 19); (8) on March 2, 2000 Plaintiff was informed
26 by her attorney that her attorney had spoken with a representative of Defendants who stated "the total
27 arrears is \$68,811.61, which includes an advance for homeowners insurance in the amount of \$7,411.04
28 and foreclosures fees of \$3,403.29" (*Id.* ¶ 21); (9) in May 2000 WMC "reported to the Credit Bureaus
that [Plaintiff] was delinquent in the amount of \$72,050" (*Id.* ¶ 26); (10) on December 15, 2000, Plaintiff
sent WMC "a one line notice of rescission taken verbatim from the unexecuted form which [she] had
received, 'I wish to cancel'" (*Id.* ¶ 29); (11) On January 5, 2001, Plaintiff received a letter dated January
2, 2001, from WMC Senior Vice President & General Counsel, Michael L. Mayer, which included an
executed Notice of Right to Cancel and informed Plaintiff that her cancellation notice was "invalid and
of no legal effect." (*Id.* ¶ 30).

None of the above facts are alleged in Plaintiff's SAC but are raised for the first time in her
opposition. "It is axiomatic that the complaint may not be amended by briefs in opposition to a motion
to dismiss." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984). That Plaintiff
is proceeding *in pro per* does not render the rules of the Court inapplicable. See *King v. Atiyeh*, 814
F.2d 565, 567 (9th Cir. 1987) (Pro per litigants must follow the same procedural rules as represented
parties.) Consequently, the Court shall limit its review to those facts properly alleged in the SAC, and
not those newly raised in Plaintiff's opposition.

1 action against Fairbanks, which involved identical claims and ended in a final judgment on the
 2 merits, by Order dated March 7, 2005, the Court granted Fairbanks' motion for summary judgment,
 3 finding that Plaintiff's claims against Fairbanks were barred by the doctrines of res judicata and
 4 release [docket no. 71.]

5 On March 15, 2005, Plaintiff filed a First Amended Complaint ("FAC"). The FAC included
 6 additional allegations against Defendant WMC, an additional cause of action for an accounting
 7 against WMC and Fairbanks, named Cal Land in the third cause of action for violations of, *inter*
 8 *alia*, the Truth in Lending Act, and added two additional causes of action against Cal Land for
 9 breach of fiduciary duty and negligence. On March 21, 2005, Fairbanks filed a motion for entry of
 10 final judgment pursuant to Federal Rule of Civil Procedure 54. On April 12, 2005, Plaintiff filed an
 11 opposition to Fairbanks' motion, and also filed a motion for leave to amend the FAC. In her request
 12 for leave to amend the FAC, Plaintiff sought to add new allegations against Fairbanks and the other
 13 defendants. On May 26, 2005, the Court denied Plaintiff's Motion for Leave to Amend the FAC,
 14 struck those portions of the FAC that added allegations against Fairbanks and Cal Land, and granted
 15 Fairbanks' motion for entry of final judgment [docket no. 96.] Plaintiff was ordered to file a Second
 16 Amended Complaint that removed the stricken allegations.

17 On June 1, 2005, Plaintiff substituted herself as counsel in place of her previously retained
 18 counsel [docket no. 97.]

19 Plaintiff filed the SAC on August 10, 2005 [docket no. 108.] On August 25, 2005,
 20 Defendants filed the instant motion to dismiss. Defendants also filed a Request for Judicial Notice.⁵

21
 22 ⁵ In Defendants' Request for Judicial Notice, Defendants request that the Court take judicial
 23 notice of exhibits: (A) Plaintiff's complaint on file in state court, *Barbera v. WMC Mortgage, Corp.*,
 24 San Francisco Superior Court Civil Action No. 322066, filed June 11, 2001; (B) this Court's Order dated
 25 March 1, 2005, Granting Fairbanks' Motion for Summary Judgment; (C) this Court's Order dated May
 26 26, 2005, Granting Fairbanks' Motion for Entry of Final Judgment; (D-E) Copies of Assembly Bill No.
 27 292 (1970 Reg. Sess. (Jan. 21, 1970)) and Assembly Bill No. 292 (1970)) (as amended Aug. 7, 1970);
 28 (F) Notice of Entry of Order Granting Defendant WMC's Motions *In Limine* Nos. 1, 2 & 4, Denying
 WMC's Motion *In Limine* 3, and Denying Plaintiff's Motion for Leave to Amend, entered by Judge
 Busch in Plaintiff's action in San Francisco Superior Court; (G) text of Proposition 2; and (H) California
 Department of Real Estate website printout.

Federal Rule of Evidence 201 authorizes the court to judicially notice only those "judicative
 facts" that are either "(1) generally known within the territorial jurisdiction of the trial court or (2)
 capable of accurate and ready determination by sources whose accuracy cannot reasonably be

1 Plaintiff filed an opposition with this Court on October 11, 2005.⁶

2 LEGAL STANDARD

3 A. Rule 12(b)(6)

4 Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss may be granted
5 if it appears beyond a doubt that the plaintiff "can prove no set of facts in support of his
6 claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). For

7
8 questioned." Fed. R. Evid. 201(b). "Adjudicative facts are usually those facts that are in issue in a
particular case." *Korematsu v. United States*, 584 F. Supp. 1406, 1414 (N.D. Cal. 1984) (Patel, J.).

9 With regard to Exhibit A, Defendants do not make clear to this Court for what purpose they are
10 requesting this Court take judicial notice of Plaintiff's state court complaint. Defendants simply state
Plaintiff has filed, with and without counsel, several civil actions against WMC and the parties have
11 conducted considerable discovery since the first action was filed in June of 2001. Defs. Mot. 2:14-20.
The existence of Plaintiff's state court complaint does not concern any "facts in issue" in this case, nor
is it relevant to the instant motion to dismiss. Consequently, the request is DENIED as to Exhibit A.

12 As the March 1, 2005 and May 26, 2005 Orders are part of the Court's own docket in this matter,
a formal request for judicial notice is unnecessary.

13 Defendants cite to Exhibits D, E and F in support of their argument that Plaintiff's Consumer
Legal Remedies Act ("CLRA") claim must fail because credit transactions do not fall within CLRA's
14 purview. Defs. Mot 13:5-24. The CLRA is a California statute which was irrelevant to the Court's
analysis and disposition of Plaintiff's federal claims. Therefore, the request for judicial notice is
15 DENIED as to Exhibits D, E & F.

16 Finally, Defendant cites to Exhibits G & H in support of their argument that Plaintiff's claim of
usury must fail as California has exempted from the usury laws licensed real estate brokers by the State
of California, and, Defendants argue, WMC was a licensed real estate broker at the time the loan was
17 made. The usury cause of action is based on state law. Again, given the Court's focus upon Plaintiff's
federal claims, these exhibits are irrelevant. For these reasons, the request for judicial notice is DENIED
18 as to Exhibits G & H.

19 ⁶ Defendants contend Plaintiff served upon them a different version of her opposition brief than
the one she filed with this Court. Defendants attached the version of the opposition they received as
20 Exhibit A to the Declaration of Seta Arabian in Support of Defendants' Reply ("Arabian Decl.") In the
version filed with the Court on October 11, 2005, in the "Foreclosure-bankruptcy issues" section,
21 Plaintiff includes two new paragraphs that are not present in the copy faxed to the Defendants and
attached to the Arabian Decl. These new sections concern Plaintiff's research into WMC's past and
22 current litigation, and what Plaintiff believes to be the relevant California laws that have been violated
by the conduct of Defendants alleged in the SAC. Additionally, in the opposition filed with the Court
23 but not in the version faxed to Defendants, Plaintiff attached copies of: 1) an article entitled "Loans Cost
Minorities More" by David Olinger and Jeffrey A. Roberts, Denver Post Staff Writers, Feb. 27, 2001;
24 2) a transcript of the testimony of Professor Cathy Lesser Mansfield before the Committee on Banking
and Financial Services, United States House of Representatives, May 24, 2000, at the Rayburn House
25 Office Building; and 3) copies of statements received by Plaintiff from WMC and Select Portfolio
Servicing, Inc.

26 These additional paragraphs and material were the only differences between the briefs received
by Defendants and filed with the Court and were not germane to the Court's analysis of Defendants'
27 motion to dismiss as they did not address the substantive issues raised by Defendants' in their motion.
Consequently, for purposes of deciding this motion, the Court restricted its review to the opposition
28 served upon Defendants.

1 purposes of such a motion, the complaint is construed in a light most favorable to the
 2 plaintiff and all properly pleaded factual allegations are taken as true. *Jenkins v.*
 3 *McKeithen*, 395 U.S. 411, 421 (1969); *Everest and Jennings, Inc. v. American Motorists Ins.*
 4 *Co.*, 23 F.3d 226, 228 (9th Cir. 1994). All reasonable inferences are to be drawn in favor of
 5 the plaintiff. *Jacobson v. Hughes Aircraft*, 105 F.3d 1288, 1296 (9th Cir. 1997).

6 When a complaint is dismissed for failure to state a claim, "leave to amend should be
 7 granted unless the court determines that the allegation of other facts consistent with the
 8 challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v.*
 9 *Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). The court should consider
 10 factors such as "the presence or absence of undue delay, bad faith, dilatory motive, repeated
 11 failure to cure deficiencies by previous amendments, undue prejudice to the opposing party
 12 and futility of the proposed amendment." *Moore v. Kayport Package Express*, 885 F.2d
 13 531, 538 (9th Cir. 1989). Of these factors, prejudice to the opposing party is the most
 14 important. See *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990) (citing
 15 *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971)). Leave to
 16 amend is properly denied "where the amendment would be futile." *DeSoto Yellow Freight*
 17 *Sys.*, 957 F.2d 655, 658 (9th Cir. 1992).

18 ANALYSIS

19 The SAC asserts the following federal claims against WMC: (1) violation of the
 20 Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601 *et seq.*; (2) violation of the Real Estate
 21 Settlement Procedures Act, 12 U.S.C. §§ 2601, *et seq.*; and (3) violation of the Fair Debt
 22 Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* ("FDCA").

23 A. Plaintiff's First Federal Claim - Violation of the Truth In Lending Act

24 1. The Statutes

25 In her third cause of action Plaintiff alleges violation of the Truth in Lending Act
 26
 27
 28

1 ("TILA"), HOEPA, and Regulation Z.⁷ SAC, ¶¶ 41-43. 15 U.S.C. § 1635(a), the provision
2 of TILA upon which Plaintiff relies, states in full:

3 Disclosure of obligor's right to rescind. Except as otherwise provided in this
4 section, in the case of any consumer credit transaction (including opening or
5 increasing the credit limit for an open end credit plan) in which a security
6 interest, including any such interest arising by operation of law, is or will be
7 retained or acquired in any property which is used as the principal dwelling
8 of the person to whom credit is extended, *the obligor shall have the right to*
9 *rescind the transaction until midnight of the third business day following*
10 *the consummation of the transaction or the delivery of the information and*
11 *rescission forms required under this section together with a statement*
12 *containing the material disclosures required under this subchapter, [15*
13 *U.S.C. §§ 1601 et seq.] whichever is later, by notifying the creditor, in*
14 *accordance with regulations of the Board, of his intention to do so. The*
15 *creditor shall clearly and conspicuously disclose, in accordance with*
16 *regulations of the Board, to any obligor in a transaction subject to this section*
17 *the rights of the obligor under this section. The creditor shall also provide, in*
18 *accordance with regulations of the Board, appropriate forms for the obligor*
19 *to exercise his right to rescind any transaction subject to this section.*

20 15 U.S.C. § 1635(a) (emphasis added). 15 U.S.C. § 1639(a)(1), the provision of HOEPA
21 upon which Plaintiff relies, states in relevant part:

22 Specific disclosures. In addition to other disclosures required under this
23 subchapter [15 U.S.C. §§ 1601 et seq.], for each mortgage referred to in
24 section 1602(aa) of this title, the creditor shall provide . . . disclosures in
25 conspicuous type size . . .

26 15 U.S.C. § 1639(a)(1). Finally, Regulation Z requires a "business which offers or extends
27 credit" to make certain disclosures:

28 Purpose. The purpose of this regulation is to promote the informed use of
consumer credit by requiring disclosures about its terms and cost. The
regulation also gives consumers the right to cancel certain credit transactions
that involve a lien on a consumer's principal dwelling, regulates certain credit
card practices, and provides a means for fair and timely resolution of credit
billing disputes.

12 C.F.R. § 226.1(b) & (c).

2. Analysis

Plaintiff seeks both rescission of her loan and damages. 15 U.S.C. § 1640(e).

⁷ The acronym "HOEPA" stands for "Home Ownership and Equity Protection Act" of 1994. HOEPA, which took effect on October 1, 1995, provides special protections for consumers who obtain high-rate or high-fee loans secured by their principal dwellings by requiring creditors to provide certain material information at least three days before the loan is consummated, prohibiting the use of certain loan terms, and barring specified practices.

1 Plaintiff's right of rescission is governed by 15 U.S.C. § 1635(f). This section provides, in
2 relevant part:

3 An obligor's right of rescission shall expire three years after the date
4 of consummation of the transaction or upon the sale of the property,
5 whichever occurs first, notwithstanding the fact that the information
and forms required under this section or any other disclosures
required under this part have not been delivered to the obligor.

6 15 U.S.C. § 1635(f). Civil penalties under TILA and HOEPA are subject to a one-year
7 statute of limitations. Plaintiff's loan closed in June of 1997. Plaintiff filed suit in state
8 court on July 23, 2004, which was removed to this Court in September of 2004, over seven
9 years later. Consequently, both Plaintiff's claim for damages, as well as her right to rescind,
10 are time-barred by these sections.

11 Plaintiff's SAC conclusorily asserts "[a]ny statute of limitations applicable to these
12 violations has been tolled under the doctrine of what is called equitable tolling." SAC ¶ 42.⁸
13 Plaintiff's defense to the statute of limitations is unpersuasive. "The equitable tolling
14 doctrine has been applied by the Supreme Court in certain circumstances, [] but it has been
15 applied sparingly." *Scholar v. Pacific Bell*, 963 F.2d 264, 268 (9th Cir.1992) (citing *Irwin v.*
16 *Veterans Admin.*, 498 U.S. 89, 111 S.Ct. 453, 457-58, 112 L.Ed.2d 435 (1990)). "Courts
17 have been generally unforgiving, however, when a late filing is due to claimant's failure 'to
18 exercise due diligence in preserving his legal rights.' " *Id.* (citing *Irwin*, 111 S.Ct. at 458).
19 "Equitable tolling focuses primarily on the plaintiff's excusable ignorance of the limitations
20 period." *Lehman v. United States*, 154 F.3d 1010, 1016 (9th Cir. 1998).

21
22
23 ⁸ In her opposition she states 11 U.S.C. § 108 extends the statute of limitations for commencing
or continuing an action by the debtor. However, as Plaintiff concedes, that statute is available for
trustees suing to protect a bankruptcy estate. Plaintiff does not assert she is a trustee.

24 Additionally, Plaintiff argues that the force-placed insurance charge "could constitute a new
25 transaction which would require new disclosures and a new consummation date." Pl. Opp. Sec. IV ¶
26 6. Plaintiff does not indicate when that consummation date would have occurred, either the date of the
charge or the date Plaintiff discovered the charge on her account. Construing the facts in the most
27 favorable light to Plaintiff, the latest date for which she could allege the force-placed insurance charge
constituted a new transaction would be the date she learned of it, March 2, 2000. That was over four
28 years prior to the filing of the instant complaint in state court. Therefore, even if Plaintiff were able to
argue that imposition of the force-placed insurance charge constitutes a new transaction requiring new
disclosures and a new consummation date, she is nevertheless barred by the statute of limitations.

Here, Plaintiff's SAC fails to plead such facts. As a preliminary matter, the factual predicate for her claim that WMC failed to provide her with certain documents should have been known to her in 1997, well before July 2004. In her opposition, Plaintiff states that she signed the "Notice of Right to Cancel" on June 12, 1997 and acknowledged, by her signature, receipt of two copies of the this notice. Pl. Opp. ¶ 1. This acknowledgment is evidence that Plaintiff received two copies of this notice, or, at a minimum, was aware that she was entitled to two copies of this notice at the time of the loan closing. Plaintiff alleges that she was not given any documents on June 12, 1997, contrary to her signed acknowledgment, but concedes that when she did receive her copy of her loan documents on June 19, 1997, she "put it away without inspecting it," and years passed before she inspected what those documents contained. *Id.* Plaintiff's failure to inspect the documents, especially in light of her signed acknowledgment, does not constitute "excusable ignorance of the limitations period" justifying imposition of equitable tolling. Thus, this claim is barred by the statute of limitations and is DISMISSED with prejudice.

B. Plaintiff's Second Federal Claim - Violation of the Real Estate Settlement Procedures Act

In her fourth cause of action, Plaintiff alleges the following acts by WMC violated the Real Estate Settlement Procedures Act ("RESPA"): "kickbacks, referral fees, unnecessary escrow accounts for taxes and hazard insurance, improper or inaccurate reporting to credit bureaus, failure to disclose the transfer of the servicing of Plaintiff's loan account, failure to respond to acknowledge 'payments from a borrower' and to acknowledge 'making the payments of principal and interest as may be required pursuant to the terms of the loan,' and other home mortgage lending practices that tend to cause excessive borrowing costs for home loan borrowers." SAC ¶ 47. Plaintiff additionally alleges that WMC violated RESPA "[b]eginning June 1999, through March 1, 2002" by failing to respond to Plaintiff's oral requests and failing to acknowledge or respond to Plaintiff's qualified written requests." SAC ¶ 21. Defendants respond that this claim is time barred.

The applicable statutes of limitations for claims brought pursuant to RESPA are

1 found in 12 U.S.C. section 2614. "Any action pursuant to the provisions of section 2605,
 2 2607, or 2608 of this title may be brought in the United States district court within 3 years
 3 in the case of a violation of section 2605 of this title and 1 year in the case of a violation of
 4 section 2607 or 2608 of this title from the date of the occurrence of the violation." See 12
 5 U.S.C. §2614.

6 1. Section 2607

7 Plaintiff's allegations of kickbacks and referral fees are covered under section
 8 2607(a).⁹ By its terms, section 2607(a) prohibits the giving or receipt of fees or kickbacks
 9 "incident to or part of a real estate settlement service involving a federally related mortgage
 10 loan." See 12 U.S.C. § 2607(a). "Settlement services" is defined as any "service provided
 11 in connection with a real estate settlement." See 12 U.S.C. § 2602(3). No where in
 12 Plaintiff's SAC does she allege where, when, how or from whom WMC received kickbacks
 13 or referral fees. Rather it is a bald assertion unsupported by facts. The facts alleged by
 14 Plaintiff fail to demonstrate the inapplicability of the statute of limitations. Plaintiff
 15 received her mortgage loan in June of 1997. Section 2614 required her to bring her claim
 16 alleging kickbacks or referral fees within one year, by June of 1998. This claim is time
 17 barred and is therefore DISMISSED with prejudice.

18 2. Section 2605

19 The remaining RESPA allegations are subject to the 3-year statute of limitations as
 20 the conduct she alleges by WMC concerns "servicing of mortgage loans and administration
 21 of escrow accounts." See 12 U.S.C. § 2605.¹⁰

23 ⁹ This provision states: "No person shall give and no person shall accept any fee, kickback, or
 24 thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to
 25 or a part of a real estate settlement service involving a federally related mortgage loan shall be referred
 to any person." 12 U.S.C. § 2607(a).

26 ¹⁰ The other statute referenced in section 2614, section 2608, is inapplicable to this case. Section
 27 2608 states: "No seller of property that will be purchased with the assistance of a federally related
 mortgage loan shall require directly or indirectly, as a condition to selling the property, that title
 28 insurance covering the property be purchased by the buyer from any particular title company."
 Plaintiff's complaint does not involve the sale of her home or allegations that she was required to

1 Plaintiff's allegations are inconsistent and insufficient to overcome the time bar for
 2 several reasons. First, the latest date for which Plaintiff alleges violative conduct on the part
 3 of WMC is April 11, 2000, over four years prior to the filing the instant complaint. Thus,
 4 her claims are time-barred. Second, Plaintiff's loan was transferred to another entity for
 5 servicing in July of 2000; Plaintiff does not explain, in her SAC or opposition, how WMC
 6 violated RESPA through March 1, 2002, *after* the loan had been transferred. Third, RESPA
 7 imposes obligations upon a party upon written requests, not oral. *See* 12 U.S.C. §
 8 2605(e)(1)(B). The only qualified written request¹¹ Plaintiff asserts in her SAC occurred on
 9 December 4, 1999, more than three years prior to the filing of the instant complaint. Fourth,
 10 even assuming Plaintiff's delayed discovery of the transfer of her loan in September, 2003
 11 was reasonable such that the doctrine of equitable tolling applied, Plaintiff learned of the
 12 transfer ten months prior to the filing of this suit. *See Santa Maria v. Pac. Bell*, 202 F.3d
 13 1170, 1178 (9th Cir. 2000) ("[E]quitable tolling will serve to extend the statute of limitations
 14 for filing suit until the plaintiff can gather what information he needs.") Plaintiff does not
 15 provide any justification for the delay between her discovery of the transfer, and the filing
 16 of the instant complaint. Therefore, she has not proven she is entitled to invoke the doctrine
 17 of equitable tolling.

18 For all these reasons, this claim is DISMISSED with prejudice.

19 C. Plaintiff's Third Federal Claim - Violation of the Fair Debt Collection Practices
 20 Act

21 In her fifth cause of action, Plaintiff alleges WMC's acts and conduct violated the
 22 Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* SAC ¶ 51.
 23 Plaintiff generally alleges all of the acts and conduct by WMC violate the FDCPA,
 24 purchase title insurance from a particular company.

25 ¹¹ 12 U.S.C. 2605(e)(1)(B) states in relevant part: "For purposes of this subsection, a qualified
 26 written request shall be a written correspondence, other than notice on a payment coupon or other
 27 payment medium supplied by the servicer, that (i) includes, or otherwise enables the servicer to identify,
 28 the name and account of the borrower; and (ii) includes a statement of the reasons for the belief of the
 borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer
 regarding other information sought by the borrower."

1 including "the improper or inaccurate reports to credit borrowers" by WMC.¹² *Id.* Here,
 2 again, WMC responds that Plaintiff's claim is time-barred. Additionally, even if the claim
 3 were not time-barred, WMC argues it is misplaced since the FDCPA only prohibits certain
 4 activities of debt collectors, not creditors such as WMC.

5 1. Statute of Limitations

6 "An action to enforce any liability created by this subchapter may be brought in any
 7 appropriate United States district court without regard to the amount in controversy, or in
 8 any other court of competent jurisdiction, within one year from the date on which the
 9 violation occurs." 15 U.S.C. § 1692k(d). As with her other allegations, Plaintiff merely
 10 asserts that the violations giving rise to the claim "continue through the present time." SAC
 11 ¶ 51. She does not offer any evidence of the nature of the acts of WMC which form the
 12 basis of the assertion, nor when they occurred. Moreover, given WMC's transfer of the
 13 servicing of Plaintiff's loan to another party in 2000, the Court is unaware of any facts
 14 Plaintiff could allege that would fall within the year prior to her filing the instant complaint.

15 2. FDCPA Applies Only to "Debt Collectors"

16 Alternatively, WMC argues that even were this cause of action not time barred by
 17 the statute of limitations, Plaintiff's claim still fails as the FDCPA is inapplicable to parties
 18 collecting their own debt.

19 The FDCPA regulates debt collectors rather than creditors. *Thomas v. Law Firm of*
 20 *Simpson & Cyback*, 392 F.3d 914, 916-17 (7th Cir. 2004). The term "debt collector" means
 21 any person who "regularly collects or attempts to collect, directly or indirectly, debts owed
 22 or due or asserted to be owed or due to *another*." 15 U.S.C. § 1692a(6) (emphasis added).
 23 The term "creditor" means "any person who offers or extends credit creating a debt or to
 24 whom a debt is owed" 15 U.S.C. 1692a(4). Furthermore, the FDCPA exempts from its

25
 26 ¹² Plaintiff references 12 U.S.C. § 2605(3)(d) with respect to her allegation of "improper or
 27 inaccurate reports to credit borrowers." SAC ¶ 51. There is no 12 U.S.C. § 2605(3)(d). In this same
 28 paragraph of the SAC, Plaintiff asserts a "loan servicer may not provide information regarding any
 overdue payment to any consumer reporting agency." *Id.* The SAC does not allege when, to whom, nor
 what information WMC provided to any consumer reporting agency regarding any overdue payments.
 Thus the SAC is completely devoid of facts to support these allegations.

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1 definition of debt collectors, "any officer or employee of a creditor while, *in the name of the*
2 *creditor*, collecting debts for such creditor." 15 U.S.C. § 1692a(6)(A) (emphasis added).
3 Because Plaintiff alleges activities by WMC regarding collection of payments owed to it
4 under the loan, i.e., it was WMC's debt it sought to recover from Plaintiff, WMC was not a
5 "debt collector" for purposes of the FDCPA. Thus, Plaintiff has no cognizable claim against
6 WMC on this ground. . . .

7 For these reasons, this claim is DISMISSED with prejudice.

8 **D. Supplemental State Causes of Action**

9 When a case is properly removed on the basis of federal question jurisdiction, but
10 the federal claims are subsequently eliminated from the case, the district court retains the
11 discretion to remand the action to state court. *See Carnegie-Mellon Univ. v. Cahill*, 484
12 U.S. 343, 348 (9th Cir. 1991). In each case, and at every stage of the litigation, the federal
13 court must consider and weigh the values of judicial economy, convenience, fairness, and
14 comity in order to decide whether to exercise jurisdiction over a case involving pendent
15 state-law claims. *Id.* at 349. When the balance of the relevant factors indicates that a case
16 properly belongs in state court, such as when the federal claims have been resolved in the
17 early stages of the litigation, the district court may decline the exercise of jurisdiction and
18 remand the action to state court. *Id.* As the United States Supreme Court recognized in
19 *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), the district court's jurisdiction
20 over state law claims "need not be exercised in every case in which it is found to exist
21 Needless decisions of state law should be avoided as a matter of comity[.]" *Id.*

22 Plaintiff's third, fourth and fifth claims are the only claims alleged over which the
23 Court has original jurisdiction. Those claims have been dismissed with prejudice.
24 Moreover, since this litigation is in its initial stage, the concerns of "economy, convenience,
25 fairness and comity" weigh in favor of declining to retain jurisdiction. *See Imagineering,*
26 *Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1309 (9th Cir. 1992), *cert. denied*, 507 U.S. 1004
27 (1993). Therefore, the Court exercises its discretion and declines to assert supplemental
28 jurisdiction over the remaining state law claims.

CONCLUSION

For the reasons stated above,

IT IS HEREBY ORDERED THAT Defendants' motion to dismiss is GRANTED.

Plaintiff's third, fourth and fifth claims are DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED THAT the case is REMANDED to the Superior Court of the State of California in and for the County of San Francisco. The clerk is directed to terminate any pending matters and to close the file.

IT IS SO ORDERED

IT IS SO ORDERED.



Dated: 1/19/06

SAUNDRA BROWN ARMSTRONG
United States District Judge

EXHIBIT C

Jun 19 08 12:13p

p.1

Patricia C. Barbera
24 Caribe Isle
Novato, Ca 94949
Phone: (415) 382-9617
Fax(415) 382-0756
E-mail: wobirds@comcast.net

June 18, 2008

Christopher O. Rivas
ReedSmith
355 South Grand Avenue, Suite 2900
Los Angeles, CA 90071-1611
Phone: (213) 457-8019
Fax: (213) 457-8080

Dear Mr. Rivas,

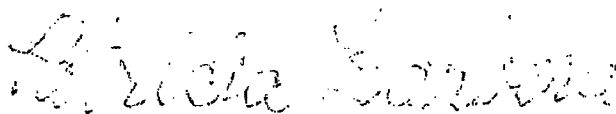
I'm filing a motion titled: Administrative Motion To Shorten the Time of the Hearing to Deter Any More Fraudulent Actions.

I'm complying with the rule that I have to request a stipulation to shorten the time. However, I will understand if you refuse.

Kindly reply ASAP.

Sincerely,

Patricia Barbera



CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2008 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

Daniel A. Gamer
Law Office of Daniel A. Gamer
55 Professional Center Parkway #H
San Rafael, CA 94903-2729
Telephone: 415.472.6655
Facsimile: 415.472.3940
Email: dan@gamerlaw.com

Robin Prema Wright
Katayoun Shakibi
Wright Finlay & Zak, LLP
4665 MacArthur Court, Suite 280
Newport Beach, CA 92660
Telephone: 949-477-5050
Facsimile: 949-477-9200
Email: rwright@wrightlegal.net
Email: kshakibi@wrightlegal.net

and I hereby certify that I have mailed *via* express mail (UPS) the document to the following non-CM/ECF participants:

Patricia C. Barbera
24 Caribe Isle
Novato, CA 94949
Telephone: (415) 382-9617
Facsimile: (415) 382-0756
In Pro Per

/s/ Christopher O. Rivas
Christopher O. Rivas
crivas@reedsmith.com

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